I believe that the Minister could deviate from the words used in Form C if he is of the opinion that the order could not be executed immediately because s 7 of the Interpretation and General Clauses Ordinance 1948 (and similar provisions under s 62 of the Interpretation Act 1967) states that where forms are prescribed, slight deviation therefrom not affecting the substance or not calculated to mislead shall not invalidate the forms. However, unlike the respondent in *PP* v *Koh Yoke Koon*,[1] the plaintiff here was under lawful detention at Pudu Prison under the Minister's order made in Form A under s 2(i) of the Enactment and his detention would continue until further orders issued by the Minister such as the one made in Form C under s 2(ii) of the Enactment. It would appear that as on 19 June 1988, when the Minister made the order in Form C, the plaintiff should be released from Pudu Prison to be taken to Kuala Krai, and his further detention in Pudu Prison after this date would appear to be illegal. This is, however, not the case here since s 3(ii) of the Enactment allows time for the Minister's order to be executed. Section 3 of the Enactment states:

> 3(i) When any such order as is referred to in section 2 subsection (ii) or section 2A has been made with reference to any person, he shall be taken before the Officer-in-Charge of the prison in which he is detained and the Officer-in-Charge shall inform him of the terms of the order and shall deliver to him a copy thereof and shall require him to state the place in which, consistently with the terms of the order, he desires in the immediate future to reside.
>
> (ii) As soon as may be after action has been taken under subsection (i), the Officer-in-Charge shall hand over the person to whom the order relates together with a warrant of release in the Form in the Schedule to any Police Officer appointed by the Chief Police Officer to receive him, and the person shall thereupon be conveyed under police escort to the place wherein he states he wishes to reside and shall there be released.
>
> (iii) In this section and in the Schedule 'Officer-in-Charge' has the meaning assigned in the Prisons Ordinance 1952.

My view is that the officer-in-charge of the prison can only take action under s 3(i) when he has received the order from the Minister. The words 'as soon as may be' in s 3(ii) of the Enactment does not envisage immediate action, but the action must be taken with all convenient speed depending on the circumstances of each particular case. Section 38 of the Interpretation and General Clauses Ordinance 1948 (similar provision is found in s 54(2) of the Interpretation Act 1967) states:

> 38 Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.

Further, the words 'as soon as may be' has been held to mean as nearly as may be reasonable in the circumstances of the particular case: *Aminah* v *Superintendent of Prison Pengkalan Chepa*.[2] The authorities have, of course, to explain to the satisfaction of the court why action could not be taken sooner.

In this case there was a delay of six days before the plaintiff was taken to Kuala Krai. The affidavits of both DSP Pow Kim Guan and the Asst Superintendent of Prison Teoh Chen Ming have explained the delay to my satisfaction. I therefore find and declare that the order made by the Minister in Form C dated 18 June 1988 is valid and that the plaintiff has to comply with that order. I make similar findings and declarations in respect of the other applications in OM R8-24-38/89, OM R8-24-39/89 and OM R8-24-40/89. Costs to the defendants.

Application dismissed.

Reported by *Yap Shao Sin*

Choh Nyee Ngah & Anor v Syarikat Beruntong Sdn Bhd

HIGH COURT (MUAR) – CIVIL SUIT NO 9 OF 1984
EUSOFF CHIN J
23 APRIL 1989

Tort – Negligence – Highway accident – Wheel coming off lorry suddenly – Latent defect – Lorry examined and certified to be in roadworthy condition prior to accident – Defence of inevitable accident – Lorry driver jumping out of lorry – Whether contributory negligence

The plaintiffs were the widow and daughter respectively of one Yee Sow Lim, deceased, a timber lorry driver who had been employed by the defendant. The deceased died following a highway accident which occurred when a wheel of the defendant's lorry that he was driving in the course of his employment suddenly came off the wheel assembly. The plaintiffs brought an action alleging negligence against the defendant and claiming damages. From the evidence given by a government vehicle examiner, it appeared that a castle nut fitted by a cotter pin to the axle had held the wheel in place and that the wheel came off following dislodgment of the cotter pin and the castle nut. It was contended for the defendant that this was a case of an inevitable accident caused by a latent defect not discoverable by the exercise of reasonable care in the inspection and maintenance of the lorry. For the defendant, evidence to the effect that the wheel bearings could have broken causing the wheel and tyre to come off was given. The lorry was bought in 1979 and there was no evidence to show that any of its wheel assembly parts had been changed although it had been put to heavy use to carry logs along jungle tracks and highways from the time of purchase up to the date of the accident on 17 June 1983. The lorry had been inspected on 19 March 1983 by a government vehicle examiner in accordance with the law which required such an examination to be undertaken every six months to determine whether the lorry was in a roadworthy condition. A certificate to the effect that the lorry was in a roadworthy condition was apparently issued following the inspection on 19

March 1983. The defendant pleaded that the deceased was contributorily negligent in that he had jumped out of the lorry before it had come to a stop and that had he remained in the driver's cabin he might not have suffered injuries or died. The lorry was loaded with logs at the time of the accident and evidence was given that there was the chance that the logs would have crushed the deceased to death if he had remained in the lorry.

Held, allowing the claim:

(1) The examination of a lorry conducted in accordance with law to determine whether it is in a roadworthy condition is not designed to detect latent defects arising out of metal fatigue through constant heavy use of the lorry. The six-monthly test certificate issued by or by the authority of the Registrar and Inspector of Motor Vehicles is not designed to exculpate a lorry owner from any blame should his vehicle cause any injury to any person in an accident arising out of some mechanical defect in his lorry.

(2) The deceased had to take his chances to save his life. The strong inference was that he had jumped out of the lorry. The deceased could not be blamed for doing what he did, or did not do, in the agony of the moment and hence the defence of contributory negligence failed.

Cases referred to

1 *Miow Ah King* v *Ram Singh* [1987] 1 CLJ 482 (refd)
2 *Barkway* v *South Wales Transport* [1950] 1 All ER 392 (refd)
3 *Henderson* v *Jenkins* [1969] 3 All ER 756 (refd)
4 *Rowley* v *Chatham* [1970] RTR 462 (refd)
5 *Govinda Raju & Anor* v *Laws* [1966] 1 MLJ 188 (refd)

Etican Ramasamy for the plaintiffs.
AC Vohrah for the defendant.

Cur Adv Vult

Eusoff Chin J: The facts not in dispute are that on 17 June 1983 at about 8.15pm, Yee Sow Lim (deceased) who was employed by the defendant company as a timber lorry driver was alone driving timber lorry No JAA 9994 with trailer loaded with logs. From the evidence, the police sketch plan and photographs produced at the trial, the lorry was entering a right-hand bend in the highway at the 3rd mile Kuantan-Segamat Road, when the front near side wheel of the lorry suddenly came off the wheel assembly. The deceased died in this accident. The deceased was driving a Mercedes Benz lorry.

The Registrar and Inspector of Motor Vehicles ('RIMV') examiner's report (exh P2) dated 18 June 1983 said that the 'nut stab axle' was dislodged causing the wheel to come out. PW 2 was the workshop executive at the Cycle & Carriage workshop which deals with repairs and maintenance of Mercedes Benz motor cars and lorries. He also had experience in maintenance and repairs of this make of vehicles. He said the 'nut stub axle' was in fact the 'castle nut' which was held in place by a 'cotter pin'. This cotter pin could have dropped off due to defective fittting or due to wear and tear. This cotter pin should not be reused once it had been taken out. The castle nut fitted to the axle held the wheel in place. When the cotter pin drops off for any reason, the castle nut and wheel of the lorry would come off. Overtightening of the castle nut would damage the nut threads, and overloading of the lorry could also cause stress to the wheel assembly parts which would give way. According to PW2, the practice at Cycle & Carriage was to thoroughly examine every part of a lorry, especially a timber lorry at every 20,000 km run, including the examination of the wheel assembly and to change the necessary parts to avoid breakdown.

The defendant owned a fleet of timber lorries, and had its own workshop to service and maintain their lorries. The evidence does not show that the defendant's workshop carried out thorough checks and examination of its lorries at every 20,000 km. This workshop would only change the lorry parts when the parts broke down. Though this workshop maintained some form of service records, there is no evidence to show that the lorry driven by the deceased had any of its wheel assembly parts changed since it was bought in 1979 to the date of the accident on 17 June 1983 although it had been put to heavy use to carry logs along jungle tracks and highways since that day it was purchased.

The defendants' mechanic PW4 said the wheel bearings could have broken causing the wheel and tyre to come off. There is, however, no evidence to say that the wheel bearings of this lorry had ever been replaced during the period of four years since it was purchased, notwithstanding that the lorry had been used to carry heavy timber and running on rough jungle tracks. PW4, the deceased's fellow lorry driver, said that the site clerk (not an employee of the defendant) determined the load to be put on the lorry when it went into the logging areas to be loaded with logs. There is no evidence to say if the lorry was or was not overloaded.

In *Miow Ah King* v *Ram Singh*[1] at p 484 Harun J (as he then was) said:

> In the instant case, it was argued that it is not reasonable to foresee that the fan of a motor vehicle would be dislodged and become a flying object when the engine is started but that will be begging the question when the duty of care begins and ends. In my view, the onus is on the defendants to show that they have taken all reasonable care to ensure that their vehicle is safe and not a danger to others. There is no evidence whatsoever why the fan became dislodged or that one of the blades broke away to become a missile. In fact there is no clear evidence which of the two things occurred. The only reasonable inference is that the fan was in such a state of disrepair that it was a patent defect because it became dislodged or came apart when the engine was started. That surely is a clear case of negligence. According to the defendants the lorry was sent regularly every six months to the Registrar and Inspector of Motor Vehicles ('RIMV') to be tested for roadworthiness but there is no evidence what sort of tests were in fact conducted. According to the first defendant during the five months immediately preceding the accident, the lorry had not been sent to the

RIMV. It was said that the lorry was checked weekly by a mechanic. Unfortunately this mechanic did not give evidence as it was said he had left the employment and could not be traced. Be that as it may, at a salary of $350 per month, he could not have been a very skilled mechanic. The lorry was five years old at the time and subject to regular and heavy use. There is no evidence that the fan had been recently changed or that it had been checked. I am satisfied that the defendants have not discharged the burden cast upon them that they have taken reasonable care to ensure that every component part of the engine of the lorry was intact and securely fitted. I accordingly find that negligence has been proved as alleged both against the first defendant (as driver) and the second defendant (as owner) of the lorry.

In *Barkway* v *South Wales Transport*,[2] it was held that the cause of the accident was a defect of the tyres which might have been discovered by due diligence on the part of the defendants and the defendants were liable although it was not possible to affirm that the fracture in the tyre would have been discovered by the exercise of due diligence. In *Henderson* v *Jenkins*,[3] a five-year old lorry was driven down a steep hill by its driver. At one point the brakes failed and the lorry collided with two other vehicles, killed a man and caused other damage. It was subsequently discovered that the pipe carrying the brake fluid was badly corroded and that the brake failure must have been caused by a large hole in the corroded part of the pipe. The instantaneous development of this hole was very uncommon and would have allowed the driver no warning of the pending brake failure. The appellant sued the driver and his employers, the respondents. In evidence it was shown that neither the vehicle manufacturers nor the Ministry of Transport recommended the removal of the pipe for inspection, although only 60 per cent of it was visible in situ and the remaining 40 per cent (in which part of pipe the hole had occurred) was particularly prone, by reason of its position, to corrosion. Evidence also established that the degree and speed of corrosion was largely determined by the use to which the vehicle was put (eg type of loads carried, places visited, unusual occurrences). The respondents led no evidence on this subject, however, relying on a plea of latent defect. It was held that the respondents had to prove that, in all the circumstances which they knew or ought to have known, they took all proper steps to avoid danger; they had failed to prove this and accordingly the appellant was entitled to damages.

In the case before me, the defendant company had sent this lorry to be inspected by the RIMV on 19 March 1983, and the accident occurred on 17 June 1983. According to DW3, Yahaya bin Tahir, who was the RIMV Muar, chief examiner of vehicles, under the law a lorry is required to be examined every six months by this departmental vehicle examiner to determine that the lorry was in a roadworthy condition. He did not dismantle lorry parts for examination. It is not a 100% examination of every part, but is a thorough check. Lorry driver PW4 himself had also witnessed how an officer of the RIMV conducted such six-monthly tests on his lorry. He said that the officer would check the body of the lorry, the amount of exhaust smoke emitted and tested the lorry brakes and steering, by driving the lorry in the RIMV office compound to ensure the vehicle was in a roadworthy condition. Yahaya bin Tahir's evidence shows that the examination of a lorry conducted by the RIMV is not designed to detect latent defects arising out of metal fatigue through constant heavy use of the lorry. I find that the six-monthly test certificate issued by the RIMV is not designed to exculpate a lorry owner from any blame should his vehicle cause any injury to any person in an accident arising out of some mechanical defect of his lorry.

In *Rowley* v *Chatham*[4] Shaw J found that on 6 March the defendant, an authorized examiner under the Motor Vehicles (Test) Regulations 1960, issued a test certificate relating to the plaintiff's husband's motor van. On 31 March the plaintiff's husband was driving the van when it steered into the path of an approaching lorry and he was killed. It was found that the upper and lower ball race cages of the steering column had broken down. There was evidence that this state of affairs had existed at the time of the test on 6 March. It was held that: (1) On the evidence adduced by the defendant, the tests required by the 1960 Regulations were properly and duly applied and would not have revealed that there was a fault or defect in the steering. (2) The relationship between the examiner and the owner of the vehicle is a contractual one but the duty owed by the examiner is prescribed by the Regulations and is limited to certifying the condition of the vehicle at the date of the examination. Any representation expressed or implicit in the certificate cannot be relied upon some weeks later.

The evidence of PW4 shows that the defendant employed three senior mechanics and two skilled mechanics. A lorry of the defendant, when not in use, would be brought to the workshop normally on Sundays to be checked by a mechanic who would replace parts as and when the need arose. It shows that parts were replaced after they broke down. It does not show that parts are replaced at regular mileage intervals to prevent them from breaking down whilst in use, such as was done by the Cycle & Carriage workshop. I do not agree that this was an inevitable accident caused by the latent defect not discoverable by the exercise of reasonable care in inspection and maintenance. I hold the defendant negligent and liable to the plaintiff for damages.

The defendant pleaded contributory negligence on the part of the deceased. It was alleged that the deceased had jumped out of the lorry before the lorry came to a stop; and that had he remained in the driver's cabin he might not have suffered injuries or died. The deceased

was driving at night, at about 8.15pm. At the most he could only see what was being illuminated by his lorry lights. He was driving a lorry carrying logs placed behind the driver's cabin. It can safely be inferred that with a front wheel off, certainly he could not steer the lorry. If the lorry had hit the hill on the side of the road and the lorry came to a sudden stop, the chances of the logs sliding on his back and crushing him to death were very great. He had to take his chances to save his life. There was no evidence that he jumped out of the lorry. The strong inference is that he did so since his body was found a short distance away from where the lorry had come to a stop. The fact is that the deceased cannot be blamed for doing what he did, or did not do, in the agony of the moment: *Govinda Raju & Anor* v *Laws*,[5] where it was held that what was done or omitted to be done by the plaintiff in the agony of the moment cannot be fairly treated as negligence and therefore there was no contributory negligence on the part of the plaintiff.

As regards quantum of damages, the funeral expenses had been agreed to at $2,000. On the evidence I find that the deceased was earning an average of $800 per month. He took meals in the house whenever he was not in the jungle loading logs on his lorry, when he had to sleep there overnight. His wife's (PW3) evidence shows that he needed about $300 to $400 per month for his own expenses. He used to give his wife for household expenses between $400 to $500 per month. PW4, deceased's fellow driver with five children, used to give his wife for household expenses between $300 to $700 per month. I would assess that the deceased's contribution to his wife and family per month be $450. Pre-trial loss of dependency between date of death of deceased to date of trial is 65 months x $450 = $29,250. Deceased was 42 years old when he died on 17 June 1983. I would give five years multiplier (55 - 47 x 2/3) and on the annuity table this gives $23,380 as future loss of dependency. Interests at 4% pa from the date of accident to date of trial on the funeral expenses of $2,000 and on pre-trial loss of dependency of $29,250. Costs to the plaintiffs.

Order accordingly.

Solicitors: *E Ramasamy & Co*; *Vohrah & Tan Chee Lan.*

Reported by *PS Ranjan*

Standard Chartered Bank v YD Edward Esnen & Ors

HIGH COURT (KUCHING) – CIVIL APPEAL NO KG 6 OF 1988
HAIDAR J
17 MARCH 1989

Civil Procedure – Claim for interest as contracted by the parties – Whether covenant to pay interest merged in judgement – Subordinate Courts Act 1948, s 99A – Subordinate Courts Rules Act 1955, s 4(g) – Subordinate Courts Rules 1980, O 29 r 12

Banking – Guarantees – Covenant to pay interest – Whether independent or ancillary covenant

The appellant's action against the respondents was founded on guarantees made by them jointly and severally in consideration of the appellant granting or continuing banking facilities to a particular company up to the extent of $125,000. The only issue in the appeal was whether the appellant was entitled to claim for 14% pa interest from the date of judgment to realization as contracted or 8% pa as allowed by the court pursuant to O 29 r 12 of the Subordinate Court Rules 1980.

Held, allowing the appeal:

It is a matter of construction of the document whether a covenant to pay interest is an independent covenant or merely ancillary. On the true construction of the guarantee, the covenant to pay interest is an independent covenant and does not merge in a judgment. As such the appellant is entitled to claim for interest at the rate of 14% pa for the post-judgment period.

Cases referred to

1 *Malayan United Bank Bhd* v *Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165 (folld)
2 *Supreme Finance (M) Bhd* v *Koo Sin Ken* [1987] 1 MLJ 374 (distd)
3 *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (distd)
4 *American International Assurance Co Ltd* v *Union Builders (M) Sdn Bhd* [1973] 1 MLJ 95 (refd)
5 *MBF Finance Berhad* v *Malaysia Air Charter Company Sdn Bhd & 4 Ors* [1987] 2 MLJ 718 (folld)
6 *Malaysian Building Society Bhd* v *Lim Kheng Kim & Ors* [1988] 3 MLJ 175 (folld)
7 *Popple* v *Sylvester* (1883) 22 Ch D 98 (refd)
8 *Re Sneyd, ex p Fewings* (1884) 25 Ch D 338 (CA) (refd)
9 *Lowry* v *Williams* [1895] 1 IR 274 (CA) (refd)
10 *London Borough of Ealing* v *El Isaac & Anor* [1980] 2 All ER 548 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 16(i), 25
High Court Rules 1980 O 42 r 12
Subordinate Courts Act 1948 s 99A, Third Schedule para 21
Subordinate Courts Rules Act 1955 s 4(g)
Subordinate Courts Rules 1980 O 29 r 12

Phang (Miss) for the appellant.
KH Tang for the first and second respondents.
TO Tan for the third, fourth and fifth respondents.

Cur Adv Vult

Haidar J: This is an appeal by Standard Chartered Bank, the appellant, against the judgment of the learned